ZEN COURTS SDN BHD v. BUKIT JALIL DEVELOPMENT SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HASNAH MOHAMMED HASHIM JCA
YEOH WEE SIAM JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-842-04-2017]
21 FEBRUARY 2018

COMPANY LAW: *Shares – Valuation – Sale of shares – Minority oppression – Allegation of – Order for buy-out shares – Valuation report prepared by mutually agreed valuer – Application by minority shareholders seeking representations be made on valuation report – Federal Court ordered that cross examination of expert witnesses in respect of valuation reports be conducted before another High Court – Whether status ante of minority shareholder in company ought to be restored – Whether buy-out order good, valid and intact – Companies Act 1965, s. 181*

The appellant ('the petitioner') filed a petition at the High Court, pursuant to s. 181 of the Companies Act 1965 ('the petition') on the grounds that the first and second respondents breached a joint venture agreement. In allowing the petition, the High Court concluded that the second respondent had acted in an oppressive manner in the affairs of the first respondent. A valuation of shares for the buy-out exercise was carried out and submitted. However, the petitioner was dissatisfied with the value of its 30% shareholding valued at RM35.97 million; according to the petitioner, the fair market value of the shares was RM262 million. The petitioner proceeded to file a notice of application ('encl. 80') to make representation on the valuation report and to call expert evidence in court. The second respondent too filed a notice of application ('encl. 84') for the court to determine the final value of the buy-out of the petitioner's shares and consequential orders to give effect to the purchase of the shares. The High Court Judge ('the HCJ') dismissed encl. 80 and allowed encl. 84. The petitioner appealed to the Court of Appeal against the decision of the HCJ. The Court of Appeal affirmed the decision of the HCJ. The petitioner then appealed to the Federal Court and the appeal was allowed. Reversing the decisions of the courts below, the Federal Court ordered that, *inter alia*, cross-examination of expert witnesses in respect of valuation reports be conducted before another HCJ. The petitioner applied to the High Court for an order to restore the *status ante* of the petitioner in the first respondent. The High Court dismissed the application. Hence, the present appeal.

Held (dismissing appeal)

Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) The *status ante* of the petitioner in the first respondent should not be restored. The buy-out order remained unchallenged by the petitioner and it was still good, valid and intact. The sum of RM35.97 million had

been paid to the petitioner. The proceedings in the High Court would determine the final value of the shares in accordance to the buy-out order *ie*, whether the value of the share was RM35.97 million or RM262 million, as claimed by the petitioner. (paras 15 & 16)

***Bahasa Malaysia** Headnotes*

Perayu ('pempetisyen') memfailkan petisyen di Mahkamah Tinggi, bawah s. 181 Akta Syarikat 1965 ('petisyen') atas alasan responden pertama dan kedua melanggar satu perjanjian usaha sama. Membenarkan petisyen, Mahkamah Tinggi merumuskan responden kedua bertindak secara menindas dalam hal ehwal responden pertama. Penilaian saham untuk langkah beli habis dijalankan dan dikemukakan. Walau bagaimanapun, pempetisyen tidak berpuas hati dengan nilai pegangan sahamnya sebanyak 30% yang bernilai RM35.97 juta; menurut pempetisyen, nilai wajar pasaran saham itu ialah RM262 juta. Pempetisyen seterusnya memfailkan notis permohonan ('lampiran 80') bagi representasi terhadap laporan penilaian dan untuk mengemukakan keterangan pakar di mahkamah. Responden kedua juga memfailkan notis permohonan ('lampiran 84') agar mahkamah menentukan nilai akhir belian saham pempetisyen dan perintah berbangkit untuk menguatkuasakan belian saham tersebut. Hakim Mahkamah Tinggi ('HMT') menolak lampiran 80 dan membenarkan lampiran 84. Pempetisyen merayu di Mahkamah Rayuan terhadap keputusan HMT. Mahkamah Rayuan mengesahkan keputusan HMT. Pempetisyen kemudiannya merayu di Mahkamah Persekutuan dan rayuannya dibenarkan. Mengakas keputusan mahkamah bawahan, Mahkamah Persekutuan memerintahkan agar, antara lain, pemeriksaan balas saksi pakar bagi laporan penilaian dijalankan di hadapan HMT lain. Pempetisyen memohon di Mahkamah Tinggi bagi satu perintah memulihkan *status ante* pempetisyen dalam responden pertama. Mahkamah Tinggi menolak permohonannya. Maka timbul rayuan ini.

Diputuskan (menolak rayuan)
Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) *Status ante* pempetisyen dalam responden pertama tidak boleh dipulihkan. Perintah beli habis kekal tidak tercabar oleh pempetisyen dan masih berkuat kuasa, sah dan kekal. Jumlah RM35.97 juta telah dibayar kepada pempetisyen. Prosiding di Mahkamah Tinggi akan menentukan nilai terakhir saham mengikut perintah beli habis iaitu sama ada nilai saham adalah RM35.97 juta atau RM262 juta, seperti yang didakwa oleh pempetisyen.

Case(s) referred to:
*Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors [2017] 2 CLJ 32 FC **(refd)***

Legislation referred to:
Companies Act 1965, s. 181

For the appellant - Gopal Sri Ram, Emily Wong & David Yii; M/s Dennis Nik & Wong
For the 1st respondent - John Skelchy; M/s James Monteiro
For the 2nd & 3rd respondents - Gopal Sreenevasan & PL Leong; M/s Sreenevasan Young

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: D-26NCC-42-2011 (affirming).]

Reported by Najib Tamby

JUDGMENT

Hasnah Mohammed Hashim JCA:

Introduction

[1] This appeal is against the decision of the learned High Court Judge made on 27 March 2017 dismissing the appellant/petitioner's notice of application dated 22 August 2016 for an order to restore the *status ante* of the petitioner in the first respondent. We had, after perusing the records of appeal and hearing and considering the written and oral submissions of learned counsel for the parties, found no merits in the appeal. We unanimously dismissed the appeal with costs of RM10,000 to the respondents subject to the payment of allocator. The deposit to be refunded. These are our reasons in full.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

The Petitioner's Notice Of Application

[3] In the notice of application (encl. 167), the petitioner had applied for the following orders, *inter alia*:

(i) to restore the *status ante* of the petitioner in the first respondent prevailing immediately prior to the court's order dated 18 July 2013;

(ii) that the petitioner be restored to the Register of the first respondent as the registered owner of 30% of the share in the first respondent;

(iii) that two persons nominated by the petitioner be appointed as directors of the Board of Directors of the first respondent.

Background

[4] The petitioner filed a petition pursuant to s. 181 of the Companies Act 1965 ("the 181 petition") on the grounds that the first and second respondents breached a joint venture agreement dated 12 September 1995 ("the JVA") entered between United Engineers Berhad ("UEM") and the second respondent. The first respondent was incorporated pursuant to the said JVA. Under the terms of the JVA, UEM held 30% shareholding and the second respondent held 70% in the first respondent.

[5] On 27 March 2012 after a full hearing, the High Court concluded that the second respondent had acted in an oppressive manner in the affairs of the first respondent company. The High Court allowed the 181 petition and granted the following reliefs: A

(i) The second respondent buys out all 4,500,000 shares of the petitioner in the first respondent, at the price of those shares to be determined by an independent valuer on a 'net tangible asset' basis. The valuation to be as at the date of the order. B

(ii) The appointment of an independent valuer to be mutually agreed by the petitioner and the second respondent. In the event the parties could not agree to the independent valuer, the parties at liberty to apply to the court to appoint a valuer. C

(iii) The valuation to be done within three months from the date of the order. The parties may make representations to the valuer as to the valuation.

(iv) The valuer appointed shall file the valuation report into court and the parties may apply. D

(v) The court will determine the final value of the shares and the terms of the buy-out order.

(vi) The costs of the valuation to be borne by the first respondent. E

(vii) The second respondent and petitioner shall be at liberty to apply.

[6] Ferrier Hodgson MH Sdn Bhd ("Ferrier") was mutually appointed by the parties to the 181 petition as the valuer to conduct the valuation of the shares for the buy-out exercise. Ferrier completed the valuation and submitted the final valuation report dated 31 December 2012. The petitioner, however was not satisfied with the value of its 30% shareholding valued at RM35.97 million assessed by Ferrier. The petitioner claimed that the fair market value of the shares was RM262 million. F

[7] Dissatisfied with the valuation, the petitioner filed a notice of application dated 26 February 2013 (encl. 80) to make representation on the valuation report and to call expert evidence in court. The grounds of the application, *inter alia*, were as follows: G

(i) There are express provisions in the buy-out order that state that parties are at liberty to apply. The court always retains the power to make further orders ancillary to or in relation to the valuation report. H

(ii) Ferrier prepared a draft valuation report which invited parties to comment on it. The petitioner had responded by counter offering a valuation done by Hartanah Consultants (Valuation) Sdn Bhd ("Hartanah"). I

(iii) Ferrier applied the wrong considerations when it relied on the valuation report of Henry Butcher in respect of the value of the land and disregarded the higher valuation conducted by Hartanah on the gross development value of the most priced asset of the first respondent company.

(iv) The petitioner averred that it would be just and reasonable that sufficient material be provided for an adequate valuation.

[8] The second respondent subsequently filed a notice of application dated 15 March 2013 (encl. 84) for the court to determine the final value of the buy-out of the petitioner's shares and for consequential orders to give effect to the purchase of the shares. The learned High Court Judge heard both the applications in encls. 80 and 84. After having considered the submissions of the parties, the learned High Court Judge dismissed encl. 80 and allowed encl. 84. The court ordered the final buy-out value of the petitioner's shares as follows:

(i) the second respondent shall buy the petitioner's shares in the first respondent at RM7.99 per share and the aggregate purchase price of the shares fixed at RM35.97 million ("the purchase price");

(ii) the buy-out must be completed no later than four months after the date of the order;

(iii) petitioner to procure the resignation of Mr Yeoh Keng Tat as director of the first respondent, such resignation to be effective on or before the date of completion of the purchase of the 30% shares.

[9] Dissatisfied with the decision of the High Court, the petitioner filed an appeal against the decision of the learned High Court Judge with respect to encls. 80 and 84. The Court of Appeal heard the appeal and affirmed the decision of the High Court Judge. The petitioner subsequently appealed to the Federal Court and on appeal to the Federal Court the petitioner's appeal was allowed. The decisions of the courts below were reversed. The Federal Court ordered, *inter alia*, as follows;

(i) the decision of the High Court and the Court Appeal in respect of encls. 80 and 84 be set aside;

(ii) order in terms of encl. 80;

(iii) cross-examination of expert witnesses in respect of the valuation reports to be conducted before another High Court Judge.

[10] The second respondent filed for an order to execute the buy-out order. On 25 February 2014, the Senior Assistant Registrar allowed the second respondent's application and made the following orders:

(i) that the petitioner having failed and/or refused on 11 November 2013 to deliver to the second respondent the form of transfer of shares in respect of the transfer by the petitioner in favour of the second

respondent of 4,500,000 ordinary shares of RM1 each in the capital of the first respondent upon receipt from the solicitors of the second respondent of their written confirmation to the court that they have in possession the cashier's orders or banker's cheques the said form of transfer of shares (form 32A) be executed by the Registrar of the High Court for and behalf of the petitioner and delivered to the second respondent's solicitors.

(ii) That the second respondent be directed to deliver to its solicitors as stakeholder, cashier's orders or banker's cheques made payable to "Chellam Wong" for the following amounts:

(a) The total amount of RM35,970,000 being the purchase price for the shares; and

(b) RM576,505.48 being the amount of interest computed at 5% per annum from 18 July 2013.

(iii) Mr Yeoh Keng Tat be deemed to have ceased to be a director of the first respondent.

(iv) The petitioner pay costs of RM10,000 each to the first respondent and the second respondent.

The High Court

[11] The learned High Court Judge having considered the submissions of the parties, dismissed the application of the petitioner to restore the *status ante* of the petitioner in the first respondent prevailing immediately prior to the court's order dated 18 July 2013. His Lordship was of the considered view that the buy-out order pursuant to the High Court order dated 27 March 2012 remained intact and unchallenged as there was no appeal by the petitioner against that order of the High Court. What the petitioner had attempted to do was to challenge the order by filing the notice of application in encl. 167. The mode taken to challenge the said buy-out order by filing encl. 167 was wrong and an abuse of process of the court. The learned High Court Judge found that the petitioner was barred by the doctrine of *res judicata* from filing encl. 167 in its attempt to challenge the buy-out order.

[12] The questions posed to the Federal Court in the petitioner's notice of motion for leave to appeal to the Federal Court were restricted to matters in relation to the valuation of the petitioner's shares in the first respondent and not the buy-out order.

Our Decision

[13] Learned counsel for the petitioner submitted that it is trite law that a successful appellant has a restitutionary right to any property transferred under any judgment of the court which is reversed. When an order is set aside on appeal, the court has the inherent jurisdiction to make restitution and to restore the parties' position prior to the impugned order granted. Therefore,

with the Federal Court order setting aside the High Court order dated 18 July 2013, it would mean that the petitioner was entitled to the restoration of the *status ante* of the parties.

[14] It was further argued that since the order dated 18 July 2013 and the consequential orders have been set aside by the Federal Court, the petitioner must be restored to its original position as the buy-out has not been completed. The restoration will preserve the integrity of the order made on 27 March 2012.

[15] Having heard parties and having perused the appeal records, we were not persuaded that we should restore the *status ante* of the petitioner in the first respondent. In short, we concurred with the learned High Court Judge that the buy-out order remains unchallenged by the petitioner. The buy-out order dated 27 March 2012 is still good, valid and intact. The Federal Court in its grounds of judgment in the appeal (*Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors* [2017] 2 CLJ 32) had given clear orders:

> Effectively, the new judge is to hear encl. 84 and determine the final value of the shares, in accordance with Abdul Aziz J's direction. This setting aside order, by no stretch of the imagination had set aside the buy-out order of 27 March 2012 or taken away the essence of the agreement. In short, this buy-out order is still good, valid and intact.

[16] The sum of RM35.97 million has been paid to the petitioner. The proceedings in the High Court will determine the final value of the shares in accordance to the buy-out order ie, whether the value of the share is RM35.97 million or RM262 million as claimed by the petitioner.

Conclusion

[17] For the above reasons, we unanimously dismissed the appeal. We ordered costs of RM5,000 to each set of respondents' solicitors subject to payment of allocator. We also ordered that the deposit be refunded to the petitioner.